

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**CATERAIR INTERNATIONAL CORPORATION :**

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period December 1, 1994 through November :  
30, 1995. :

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In the Matter of the Petition :

of :

**CATERAIR INTERNATIONAL, INC. :**

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period December 1, 1996 through May 31, 1998. :

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DETERMINATION  
DTA NOS. 817653,  
817654 AND 817655

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In the Matter of the Petition :

of :

**SKY CHEFS, INC. :**

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period March 1, 1996 through February 28, 1999. :

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Petitioner Caterair International Corporation, 524 E. Lamar Boulevard, Arlington, Texas  
76011-3929, filed a petition for revision of a determination or for refund of sales and use taxes

under Articles 28 and 29 of the Tax Law for the period December 1, 1994 through November 30, 1995.

Petitioner Caterair International, Inc., 524 E. Lamar Boulevard, Arlington, Texas 76011-3939, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1996 through May 31, 1998.

Petitioner Sky Chefs, Inc., 524 E. Lamar Boulevard, Arlington, Texas 76011-3929, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1996 through February 28, 1999.

A consolidated hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 6, 2000 at 10:30 A.M., with all briefs to be submitted by June 15, 2001, which date began the six-month period for the issuance of this determination. Petitioners appeared by Phillips, Lytle, Hitchcock, Blaine & Huber LLP (Edward M. Griffith, Jr., Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (James Della Porta, Esq., of counsel).

### ***ISSUE***

Whether purchases of dry ice by petitioners, caterers of in-flight meals for airlines, were properly subject to the imposition of sales tax.

### ***FINDINGS OF FACT***

1. Petitioners, under agreements with various airlines, prepared food for in-flight meal service and delivered it to the airlines in airline-supplied serving carts shortly before the scheduled time of their flights. Petitioners' customers consisted of approximately 20 different airlines, with American Airlines their largest customer. In 1996, petitioner Sky Chefs, Inc. ("Sky Chefs"), acquired the other two petitioners, which are operating now as Sky Chefs flight

kitchens. During the audit period,<sup>1</sup> Sky Chefs had approximately 2,000<sup>2</sup> employees in New York and prepared approximately 50,000 in-flight meals on a daily basis. At JFK airport in New York City, Sky Chefs maintained four<sup>3</sup> kitchens. In addition, during the audit period, at the Rochester Airport in Monroe County, petitioner Caterair International Corporation maintained kitchen facilities and at LaGuardia Airport in New York City, petitioner Caterair International, Inc. maintained kitchen facilities.

2. In catering in-flight meals, petitioners used close to 100 pounds of dry ice per flight, or approximately 1,750,000 pounds of dry ice annually. They did not pay sales tax on their purchases of dry ice.

3. The Division of Taxation (“Division”) issued a Notice of Determination dated July 2, 1998 against petitioner Caterair International Corp. asserting sales tax due of \$33,486.60 plus interest on its purchases of dry ice for the period December 1, 1994 through November 30, 1995. It also issued a Notice of Determination dated January 24, 2000 against petitioner Caterair International, Inc. asserting sales tax due of \$36,387.61 plus interest on its purchases of dry ice for the period December 1, 1996 through May 31, 1998. Finally, the Division issued a Notice of Determination dated February 18, 2000 against petitioner Sky Chefs asserting sales tax due of \$197,389.39 plus interest on this petitioner’s purchases of dry ice for the period March 1, 1996 through February 28, 1999.

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<sup>1</sup> Although the caption of this determination references three distinct audit periods, two of the three periods overlap and in the body of this determination, all three audit periods are referenced by the terminology “the audit period.”

<sup>2</sup> It is uncertain whether this number, which was specified in the course of the testimony of petitioners’ witness, Edward J. Guenther, included employees who were actually employed by the other two petitioners.

<sup>3</sup> Although it is somewhat unclear, petitioner Caterair International, Inc., likely operated under its own name one or more of the four kitchens located at JFK airport which Mr. Guenther testified were operated by Sky Chefs. The confusion arises since Sky Chefs now operates all of the kitchens.

4. Petitioners delivered food to the airlines in airline-owned serving carts, also described as galley carts. These carts are insulated and have compartments, sometimes referred to as sleeves, on the front and back doors in which dry ice is placed to maintain the temperature of the food during its delivery to and during the flights. The carts, with an empty weight required to be under 55 pounds, are standard equipment for commercial aircraft. They are designed to very specific measurements so as to fit precisely, secured by clamps or latches, within an aircraft's galley area, when they are not being used by flight attendants up and down the narrow aisles of an airplane to serve passengers their meals. They are also required to have the capacity to hold 28 meal trays. An American Airlines "Galley Cart Request for Proposal" includes ten pages of detailed engineering specifications and reflects requirements imposed by the Federal Aviation Administration (FAA) and the United States Public Health Service (USPHS). Purchase orders of American Airlines to its supplier of galley carts, Iacobucci USA, show that each cart costs approximately \$760.00.

5. Under Federal government regulations, prepared food served by a commercial airline must be maintained at a temperature of 40 degrees Fahrenheit or lower for all but four hours of the period between the time the food preparation is completed and the time of the in-flight food service by the airline to its passengers. To meet this standard, after preparation, petitioners place the food in a blast chiller to bring the temperature to or below the mandated 40 degrees. The food is then packaged on food trays in a refrigerated environment, and the trays are placed in a cooler. About two hours before a flight's scheduled departure, petitioners load the trays on the airline's galley carts in a refrigerated environment and store the carts in a cold holding area with the doors of the carts kept open. At the last possible moment, dry ice is placed in the slots on the doors of the carts, and the doors are closed and the carts loaded on a truck for delivery to the

particular flight. Any prolonged delay in flight departure would require petitioners to replenish the dry ice.

6. Dry ice is carbon dioxide gas that is compressed into a block with a temperature of minus 109.3 degrees Fahrenheit. Dry ice sublimates, i.e., changes from a solid to a gas without producing a residue or liquid. As it sublimates, the gas that is emitted from dry ice maintains the temperature in a closed environment such as a galley cart.

7. As noted in Finding of Fact “1”, except for kitchen facilities operated by petitioner Caterair International Corporation at the Rochester Airport in Monroe County, all of the other kitchen facilities were at the two airports in New York City. Dry ice used at the New York City facilities was purchased by petitioners from either Dry Ice Corporation or Nanduzzi Brothers, who appear to be the only two suppliers of dry ice in the New York City area. The record does not disclose the supplier of dry ice to the kitchen facilities at the Rochester Airport. Petitioners are billed for the dry ice they purchase from these suppliers at a per pound unit price, which also was not disclosed. In turn, petitioners in billing their airline customers, for whom they prepare and provide in-flight meals, separately state a charge for dry ice at a per pound unit price depending on how much dry ice is used on a particular flight. Petitioners’ witness was uncertain whether the unit price for dry ice billed to the airlines was “marked-up” but presumed so.

8. Petitioner submitted nine proposed findings of fact. Proposed findings of fact “4”, “5”, “6”, “7”, “8”, and “9” are accepted and incorporated into this determination. Proposed findings of fact “1”, “2”, and “3” are accepted except to the extent that they each state that petitioners were engaged in catering food and services to commercial *aircraft* rather than *airlines*, which will be addressed further in the Conclusions of Law.

### ***SUMMARY OF THE PARTIES' POSITIONS***

9. Petitioners contend that their purchases of dry ice constituted the “providing [of] a maintenance service by adding dry ice to the aircraft carts” (Petitioners’ brief, p. 10). According to petitioners, such “services” were not taxable as the “maintaining, servicing or repairing” of tangible personal property under Tax Law § 1105(c)(3). Rather, they were covered by the exemption at subsection (v) of Tax Law § 1105(c)(3), which exempts “such services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment.” In the alternative, petitioners argue that their purchases of dry ice were covered by the exemption from sales tax specified at Tax Law § 1115(a)(21) for “[c]ommercial aircraft . . . machinery or equipment to be installed on such aircraft and property used by or purchased for the use of such aircraft for maintenance and repairs . . . .”

10. The Division points out that the Tax Appeals Tribunal in *Matter of Sky Chefs, Inc.* (March 18, 1999) decided that dry ice purchased by Sky Chefs was not exempt from sales tax under the resale exclusion or packaging exemption. The Division rejects petitioners’ new argument that their purchases of dry ice are exempt from sales tax because the dry ice is used to maintain galley carts used on aircraft. Rather, the Division insists that petitioners use dry ice to refrigerate food, which is “merely an ancillary component of petitioners’ food service business” (Division’s letter brief, p. 3). The Division rejects petitioners’ contentions as “forced and contorted” since the dry ice does not “maintain the carts” (Division’s letter brief, p. 4).

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1105(a) provides for the imposition of sales tax upon the “receipts from every sale of tangible personal property, except as otherwise provided in this article.” The dry

ice purchased by petitioners is clearly “tangible personal property,” which is defined expansively at Tax Law § 1101(b)(6) as “[c]orporeal personal property of any nature” (*cf., Video Memories Associates, Ltd.*, Tax Appeals Tribunal, March 14, 1996). Further, the terminology of “sale, selling or purchase” is also defined expansively as “[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration . . . .” Consequently, petitioners’ purchases of dry ice from their suppliers were clearly sales of tangible personal property.

B. Petitioners have the burden of proving the nontaxability of their purchases of dry ice since Tax Law § 1132(c) provides a presumption that all receipts for property mentioned in Tax Law § 1105(a) are subject to tax until the contrary is established. Furthermore, exemptions from tax are strictly construed. “An exemption from taxation ‘must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption’” (*Matter of Grace v. State Tax Commn.*, 37 NY2d 193, 196, 371 NYS2d 715, 718, *lv denied* 37 NY2d 708, 375 NYS2d 1027 quoting *People ex rel. Savings Bank of New London v. Coleman*, 135 NY 231, 234). In addition, the statutory language providing the exemption must be construed in a practical fashion (*see, Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995).

C. In the prior proceeding of *Matter of Sky Chefs, Inc.* (Tax Appeals Tribunal, March 18, 1999), petitioner Sky Chefs argued that its purchases of dry ice were not subject to the imposition of sales tax on the basis that they represented purchases for resale, as well as an argument in the alternative, that the dry ice fit within the exemption from sales tax for packaging materials. In its decision cited above, these arguments were rejected by the Tribunal.

D. In the matters at issue, petitioners have chosen to revisit the issue of whether their purchases of dry ice from their suppliers were exempt from the imposition of sales tax. They

now argue that their purchases of dry ice constituted exempt *maintenance* services rendered to commercial aircraft equipment, i.e., galley carts, under Tax Law § 1105(c)(3)(v) or alternatively under Tax Law § 1115(a). These arguments are rejected as based upon an overly expansive view of the terminology of *maintenance and repairs*, which would result in construing the statutory exemptions at issue in an unnatural and impractical way (*see, Matter of Qualex, Inc., supra*). Petitioners' reliance on the decision of the Tax Appeals Tribunal in *Aero Instruments and Avionics, Inc.* (October 5, 1995) is misplaced. The taxpayer in that matter was engaged in the business of overhauling and repairing aircraft instruments and components, and it purchased the items and equipment at issue for that purpose. In contrast, petitioners were producing a product, i.e., in-flight meals, for their customers, various airlines, and their purchases of dry ice were necessary in order to provide a safe and useable product to the airlines at the appropriate temperature. The dry ice was not purchased by petitioners to repair or maintain the galley carts.

E. Petitioners' arguments are reminiscent of the contention made by a hotel operator that its purchases of guest room furniture (e.g., beds, table, lamps, etc.), furnishings (e.g., towels, sheets, etc.), and items supplied for use or consumption by guests (e.g., soap, stationery) were exempt from sales tax because it was "reselling" such property to its guests by providing a license to use or possession of such items to its guests (*see, Matter of Helmsley Enterprises, Inc.*, Tax Appeals Tribunal, June 20, 1991, *confirmed* 187 AD2d 64, 592 NYS2d 851, *lv denied* 81 NY2d 710, 600 NYS2d 197). The Tribunal in rejecting this argument held that items utilized by the hotel operator to provide a hotel service were not retail sales of such items to the hotel guests. In confirming the Tribunal's decision, the Appellate Division emphasized the reasonableness of the *substance* of the Tribunal's conclusion that:



a hotel such as petitioner's is not in the business of buying and then reselling the use of guest room furniture, furnishings and guest consumables. Rather, it is in the business of providing a service, the overnight accommodation of its patrons, 'and the items at issue were furnished to the hotel's guests as part of its services' (*Helmsley Ent. v. Tax Appeals Tribunal*, 187 AD2d 64, 851 NYS2d 851, 853, *lv denied* 81 NY2d 710, 600 NYS2d 197).

Similarly, the dry ice utilized by petitioners in providing a catering service to *airlines* may not be recategorized as the provision of maintenance services to an airline's *aircraft* or equipment, which is an abstraction that ignores the fundamental nature of petitioners' operations.

Petitioners, simply stated, were not in the business of maintaining aircraft equipment, i.e., galley carts for airlines. Rather, they were caterers who used the dry ice in their catering operations.

F. In sum, the exemptions claimed by petitioners are far from "clearly appear[ing]" (*Matter of Grace v. State Tax Commn., supra*), and sales tax was properly imposed on their purchases of dry ice.

G. The petitions of Caterair International Corporation, Caterair International, Inc. and Sky Chefs, Inc. are rejected, and the notices of determination dated July 2, 1998, January 24, 2000 and February 18, 2000, respectively, are sustained.

DATED: Troy, New York  
November 1, 2001

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE